MOTION OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION TO AFFIRM

(Filed April 12th, 1945)

(Title of Court and style of case omitted.)

Appellees United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final judgment, dated February 14, 1945, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiffs' complaint to set aside an order of the Interstate Commerce Commission.

This suit was brought by various coal-dealers or coal-consumers located in Richmond, Ashland, Chester, Hopewell, and Petersburg, Virginia, to set aside a report (256 I. C. C. 429) and order of the Interstate Commerce Commission entered November 8, 1943, wherein the Commission, in a report on further hearing, concluded that, under Section 1 of Part I of the Interstate Commerce Act (49 U. S. C. 1), the rates of various common carriers by rail for the transportation of bituminous coal in carloads from points in West Virginia, Kentucky, and western Virginia, to certain destinations in eastern and central Virginia (including those in which plaintiffs are located) were unreasonable for the future to the extent that they

exceeded $2.45 per ton, but were not unreasonable for the past. The Commission in its order of November 8, 1943, directed the carriers to adopt $2.45 per ton rates for the future, but in view of its conclusion that the rates were not unreasonable in the past, did not award reparation for the past, which plaintiffs had sought in their complaints before the Commission. On January 14, 1944, plaintiffs filed a petition for reconsideration which was denied by the Commission on April 3, 1944. Plaintiffs sought to set aside the Commission's order only insofar as it related to the past and found the rates not then unreasonable.

The rail carriers whose rates are involved are the Chesapeake and Ohio Railway Company, the Norfolk and Western Railway Company, and the Virginian Railway, collectively referred to as the Pocahontas carriers, and also various connecting railroads including the Southern Railway Company, the Atlantic Coast Line Railroad Company, the Richmond, Fredericksburg and Potomac Railroad Company, and the Seaboard Air Line Railway.

The rates involved cover the transportation of coal from fields in several origin districts. The most easterly of these districts are the Pocahontas district on the lines of the N. & W., the New River district on the lines of the C. & O., and the New River-Pocahontas district on the lines of the Virginian. The rates are equal from any origin in these districts to any point in an extensive destination territory, except to points local to one or the other of the Pocahontas lines.

The destination territory extends from Blackstone on the N. & W., Whitlock on the C. & O., and Patrick Henry on the Virginian, east to the Atlantic coast, approximately 118 miles along the N. & W., 129 miles along the C. & O., and 168 miles along the Virginian. It includes not only points on the Pocahontas lines, but also points on connecting carriers. Richmond is approximately in the geographical center of this destination territory. (241 I. C. C. 120, 122.)

At the time the first complaints were filed before the Commission in February 1937, the rates were $2.65 per ton. On November 15, 1937, following *General Commodity Rate Increases, 1937*, 223 I. C. C. 657, the rate became $2.75 and on March 18, 1942, following *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, the rate became $2.80. Subsequent proceedings in the latter case resulted in the suspension of the increases and the rate became $2.75, effective May 1, 1943. For clarity, the Commission throughout its reports referred to the assailed rate as the $2.65 rate. From certain other coal-field districts, west of those mentioned above, to the same destination territory, the rate reflects a slight differential, and is generally ten cents higher than the $2.65 rate, except that from one district the rate is 30 cents higher (241 I. C. C. 120, 121).

Plaintiffs filed a complaint with the Commission on February 1, 1937, alleging that the above rates were, are, and for the future would be unreasonable in violation of Section 1 of Part I of the Interstate Commerce Act (49 U. S. C. 1). Reasonable rates

for the future and reparation, including reparation on shipments moving during the pendency of the proceedings, were sought. After answers by the carriers, a full hearing was had before one of the Commission's examiners and subsequently, after the filing of briefs, an examiner's proposed report was issued. Following exceptions thereto by the carriers and oral argument before Division 4, that Division on July 3, 1940, issued its report (241 I. C. C. 120), wherein the Commission dealt not only with this complaint but with other complaints, attacking, for the most part, rates to the same destination territory, which other complaints are not, however, involved in the present suit. Plaintiffs' case before the Commission was based primarily on cost of the service, rather than on rate comparisons. They introduced a cost study by means of which they sought to segregate the actual cost of transportating this coal, and endeavored to establish that the carriers from their existing rates on this traffic earned more than the cost of transporting it, including a fair margin of profit. The Commission found that plaintiffs' cost study, owing to many deficiencies, was not entitled to any controlling weight, and that the rates involved were not unreasonable by comparison with numerous other rates. It concluded that the assailed rates had not been shown to have been or to be unreasonable and dismissed the complaints.

Plaintiffs on September 20, 1940, filed a petition for reconsideration, and the Commission reopened the

proceedings for further hearing. At such further hearing, plaintiffs and the defendant carriers introduced additional evidence bearing upon the reasonableness of the rates. Plaintiffs, in particular, by additional cost evidence sought to overcome the defects in their cost study previously recognized by the Commission. After briefs had been filed, the trial examiner issued a second proposed report. Exceptions were again filed by the parties, the case was orally argued before the full Commission, and on November 8, 1943, it issued its report (256 I. C. C. 429) and order on further hearing here attacked.

With respect to the question of future unreasonableness the Commission in this report made the following subordinate findings (256 I. C. C. at p. 451):

> The assailed rate of $2.65 to the destination group as a whole compares favorably with rates from both the southern and northern fields to many destinations throughout the East and to the Carolinas. Confined to the less-distant points in the group, however, most of such comparisons indicate that the assailed rate is relatively high. Moreover, measured by cost alone, this rate is much too high, especially to the western portion of the group. While we are not warranted in fixing rates solely on the basis of cost, nevertheless that element, when supported by a cost study such as the one here before us, is entitled to considerable weight. As indicated in the prior report, this destination group extends from east to west for 168 miles on the Vir-

ginian, 118 miles on the N. & W., and 129 miles on the C. & O. Richmond is approximately in the geographical center of the group. There is no adequate reason for such an extensive destination group on this traffic and, considering the lengths of the hauls involved, we believe it to be unduly large. The record is persuasive that any material reduction in the track-delivery rates to Hampton Roads would carry with it a corresponding reduction, not only in the inside-the-capes [1] rates to Hampton Roads, but in like rates from the northern mines to Baltimore, which in turn would probably force reductions in other important rates on northern coal. Such collateral reductions would not result, however, from a reduction in the rates to the western portion of the destination group.

Considering the differences in the lengths of the hauls and in the operating conditions, the assailed rates to Lynchburg and River-

[1] The Commission's report indicates that the rates from the base groups on the Pocahontas lines to Norfolk and Hampton Roads on track-delivery coal, the rates here involved, had uniformly been 25 cents per ton less than the rates to the same points for transshipment by water to points in the Chesapeake Bay area lying inside the Chesapeake Capes (Cape Charles and Cape Henry). The same relationship had prevailed at Baltimore and Philadelphia between the track-delivery rates to those points and the rates to those points for transshipment by water to points within the Capes. The northern carriers feared that a reduction in the track-delivery rates to Norfolk would mean eventually a reduction in the inside-the-Capes rates at that point, which would in turn for competitive reasons result in a demand for a reduction of their inside-the-Capes rates at Baltimore and Philadelphia. (See 256 I. C. C. at p. 448.)

> mont [2] are too high by about 10 cents compared with the prescribed rates to Buena Vista and Charlottesville, and with the reasonable rates herein prescribed to the western portion of the present $2.65 destination group.

On the question of reparation, or past unreasonableness, the Commission made these subordinate findings (256 I. C. C. at pp. 451–452):

> *Reparation.* As stated, complainants assailing the rate of $2.65 seek reparation to the same basis as is found to be reasonable for the future, whereas complainants assailing the rates to Lynchburg and Rivermont seek reparation only in the amount of the 10-cent emergency charge.
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> The rate of $2.65 is the outgrowth of a rate of $1.50 established in 1906, which, in 1915 when we decided *Bituminous Coal Rates to the Southeast*, 37 I. C. C. 652, applied from the Pocahontas and New River districts to a destination group extending from Lynchburg on the west to Hampton Roads on the east. In that proceeding we found that group to be too large and prescribed a rate of $1.40 to Lynchburg, but denied reparation. Since then in more than a dozen proceedings we have prescribed rates from one or more of these origin groups to a number of destinations to the north, south, and west of the present $2.65 group which, in general, compare favor-

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[2] Lynchburg and Rivermont lie west of the $2.65 destination territory. The rate from these origins to those points had been $2.15. (See 256 I. C. C. at p. 431.) Such rates are not involved in the present suit.

ably, differences in distance and transportation conditions considered, with this assailed rate to the destination group as it has existed throughout the entire reparation period. Moreover, in *L. D. Wingfield-Hatcher Coal Co.* v. *Chesapeake & O. Ry. Co.*, 191 I. C. C. 644, decided in 1933, division 5 found not unreasonable this same rate of $2.65 from the New River mines on the C. & O. to Richmond, the principal destination in the group. So also, the assailed rate of $2.15 was prescribed to Lynchburg in *Virginia State Corp. Comm.* v. *Norfolk & W. Ry. Co.*, *supra*, and *Staunton Brick Co.* v. *Chesapeake & O. Ry. Co.*, *supra*, in 1932, and to Rivermont in *A. S. Nowlin & Co.* v. *Chesapeake & O. Ry. Co.*, 213 I. C. C. 101, in 1915.

Under the circumstances, the situation here insofar as reparation is concerned is much like that in *Cynthiana Construction Co.* v. *Louisville & N. R. Co.*, 144 I. C. C. 344; *Eastern Livestock Cases of 1926*, 144 I. C. C. 731; *Coal Trade Assn. of Indiana* v. *Baltimore & O. R. Co.*, 185 I. C. C. 225, 190 I. C. C. 743; and *Scott County Milling Co.* v. *Butler County R. Co.*, 194 I. C. C. 763, wherein, in declining to find rates unreasonable in the past, we followed the principle announced most clearly in the second of those reports, page 781, as follows:

"When we are of the opinion that rates have become unreasonable as the result of changes in conditions so gradual that no date can be pointed out upon which they became unreasonable, and the history of the rates is such as to

justify the carriers in believing that they were maintaining rates which had our approval, we have the power to fix the reasonable rates for the future, and, in that "flexible limit of judgment which belongs to the power to fix rates" to refuse to hold the rates unreasonable in the past."

It is true that in authorizing the addition of the 10-cent emergency charge we pointed out in *General Commodity Rate Increases, 1937, supra*, at page 745, that the sole justification for increasing the bituminous-coal rates of the Pocahontas lines "lies in the needs of other carriers." But the rates here assailed are only a few of a large body of rates maintained by these defendants to which we have authorized the addition of that emergency charge as well as, for a time, the 5-cent general increase; and it is still true that "the history of the rates is such as to justify the carriers in believing that they were maintaining rates which had our approval." Accordingly, the principle above quoted is applicable here.

From these findings, the Commission concluded that the rates assailed were not unreasonable in the past, and would not be unreasonable in the future, as to points in the $2.65 destination group east of a line drawn from north to south through Doswell, Richmond, Hopewell, Petersburg, Jarrott, and Emporia, Virginia. It further concluded that for the future the assailed rate from the base groups would be unreasonable to points in the $2.65 destination group on the west of that line to the extent that it might exceed $2.45, and to Lynchburg and River-

mont, Virginia, to the extent that it might exceed $2.05. The Commission assumed that the defendants would desire to continue to maintain the present origin differentials and, accordingly, it made no finding for the future as to the rates from the differential districts. To the foregoing rates, the Commission permitted the addition of the 10-cent emergency charge previously authorized in *General Commodity Rate Increases, 1937*, 223 I. C. C. 657. It stated that an appropriate order would be entered.

The evidence upon which the Commission's conclusions were based was not introduced before the District Court, in view of which it must be assumed that the findings of the Commission are supported by substantial evidence. *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 125; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286. Plaintiffs' attack must therefore be limited to the proposition that the Commission's report on its face is unlawful because its conclusion that the rates were not unreasonable in the past is, in view of its contrary conclusions as to the future, arbitrary and unsupported by essential findings.

In a very full opinion, the lower court concluded that it had no jurisdiction to entertain the suit, because of its views that a party who has sought reparation before the Commission which has been denied, cannot bring a suit in a three-judge court under the Urgent Deficiencies Act to set aside the order of denial. *Standard Oil Co.* v. *United States*, 283 U. S. 235, 240–241; *Rochester Telephone Co.* v.

United States, 307 U. S. 125, 140, note 23; *Atlantic Lumber Corporation* v. *Southern Pacific Co.*, 47 F. Supp. 511, 513 (D. Ore.); *Brady* v. *Interstate Commerce Commission*, 43 F. 2d 847, 850–851 (N. D. W. Va.), affirmed *per curiam*, 283 U. S. 804; *Allison & Co.* v. *United States*, 12 F. Supp. 862, 863–864, (S. D. N. Y.), affirmed *per curiam*, 296 U. S. 546.

Secondly, assuming only *arguendo* that it had jurisdiction, the Court considered and disposed of the case on the merits. It held that there is nothing inconsistent in the Commission's holding that the rates were unreasonable for the future, but that the same rates were not unreasonable as to the past. *Baer Bros. Co.* v. *Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 486. The Court also reviewed the findings of the Commission and found that they were sufficient, and concluded that the plaintiffs did not sustain the heavy burden imposed on them of showing the order was invalid.

It is submitted that the conclusions of the District Court are sound, and that this appeal presents no substantial question requiring oral argument, and that the decree of the District Court should be affirmed without argument.

1. While plaintiffs' complaint attacked the Commission's order only insofar as it failed to conclude that the rates found unreasonable in the future were equally unreasonable in the past, and sought to have the case remanded to the Commission for further action, the obvious ultimate aim of this suit is to secure the reparations refused by the Commission.

Such being the nature of the suit, we submit that the provisions of Section 9 of Part I of the Interstate Commerce Act (49 U. S. C. 9) prevented the District Court from assuming jurisdiction. We think that where a party has elected to seek reparations from the Commission and an order has been entered which denies reparations, Section 9 bars a suit before a three-judge district court sitting under the Urgent Deficiencies Act to set aside such order. This is evident from the decision in *Standard Oil Co.* v. *United States*, 283 U. S. 235. There suit had been brought under the Urgent Deficiencies Act to annul an order of the Commission dismissing two complaints to recover damages on the ground that the legally applicable rates had been applied to the transportation in question. *Standard Oil Co.* v. *A. T. & S. F. Ry. Co.*, 139 I. C. C. 297. The petition also prayed that the Commission should be directed to enter an order granting the prayer of the complainants, finding that the petitioner had been overcharged by an amount equal to the difference between the rates assessed and the lawfully applicable rates, and requiring a further hearing, if necessary, to determine the damages. The Court held that the provisions of Section 9 of the Act, requiring election of remedies, barred the assumption of jurisdiction. As the Court said (283 U. S. 235, 240–241):

> * * * Section 9 of the Interstate Commerce Act, c. 104, 24 Stat. 379, 382; U. S. C. Title 49, Sec. 9, provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by

an action in a federal district court of competent jurisdiction, but that the claimant or claimants "shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure. Compare *Geo. A. Hormel & Co.* v. *Chicago, M. & St. P. Ry. Co.*, 283 Fed. 915, 918.

It is true that appellant sought to enjoin and set aside the order of the Commission, but only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission. This is made clear by the prayer of the petition, already quoted, namely, that the Commission be directed by the court to grant the prayer of the complaints; find that petitioner has been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation. It is of no importance that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaints filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection. In substance and in principle the claim before the Commission and the claim before the court

were the same, and the district court was without authority to entertain the controversy. It is hardly necessary to add that, since Sec. 9 contemplates that the jurisdiction in such cases shall be exercised by the federal district courts as ordinarily constituted, the specially constituted court is without jurisdiction to dispose of an action under that section even if brought in the district court in the first instance.

While *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, has since greatly circumscribed the negative order doctrine mentioned in the *Standard Oil* case, the Court in the *Rochester Telephone* case made it plain that the *Standard Oil* case was primarily based on Section 9 rather than the negative order doctrine, and was still good law. Thus the Court said in a footnote (307 U. S. 125, 140) that "*Standard Oil Co.* v. *United States* [283 U. S. 235] held not reviewable the action of the Commission refusing to grant reparation, but the main basis of the decision was not the 'negative order' doctrine, but the statutory scheme dealing with reparations." That the *Standard Oil* case was not reversed by the *Rochester Telephone* decision and that under it a three-judge court cannot review a Commission order, such as the present, denying reparation, was also made manifest in the more recent *Atlantic Lumber Corporation* case, 47 F. Supp. 511, 514 (D. Ore.). And it is clear from the decision of the statutory three-judge court in *Allison & Co.* v. *United States*, 12 F. Supp. 862, 863–864 (S. D. N. Y.), affirmed *per curiam*, 296 U. S.

546, that under the doctrine of the *Standard Oil* case, a court under the Urgent Deficiencies Act cannot review an order of the Commission denying reparation, even though the complaint before the court does not request damages.

2. Plaintiffs' contentions that the Commission's report does not contain adequate findings and that its findings do not support its ultimate conclusion that the assailed rates were not unreasonable for the past, must be rejected. The question of reasonableness of a rate is an ultimate question of fact entrusted, like many other questions, to the expert judgment of the Commission. *E. g., Cincinnati, New Orleans & Texas Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 184, 194, 196; *Illinois Central Railroad* v. *Interstate Commerce Commission*, 206 U. S. 441, 455, 456. In determining the validity of the Commission's action under such circumstances the judicial inquiry is exhausted when it is determined that there is a rational basis, and substantial evidence to support the conclusions approved by the Commission. *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286–287; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6–7. Here, even the question of substantial evidence is not open to the court, because plaintiffs have not introduced the record before the Commission.

We submit that the Commission's subordinate findings (set forth *supra*) with respect to the past reasonableness of the rates are adequate to indicate

the basis for its ultimate conclusion that the rates were not unreasonable, and they afford a rational basis for such conclusion.

The Commission, in the portion of its report entitled "Discussion and Findings" (256 I. C. C. at pp. 451–452), dealt with the question of reparation. There the Commission described the history of the rates and stated that in 1933 it had found not unreasonable the assailed rate of $2.65 from the New River mines on the C. & O to Richmond, the principal destination in the destination group. It found too that in more than a dozen proceedings it had prescribed rates from one or more of these origin groups to destinations to the north, south, and west of the present $2.65 group which, in general, compare favorably, differences in distance and transportation conditions considered, with the assailed rate to the destination group as it had existed throughout the entire reparation period. Also it found that the history of the rates was such as to justify the carriers in believing that they were maintaining rates which had its approval. Finally, it concluded that under such circumstances, it had the power to fix reasonable rates for the future, yet at the same time, in that "flexible limit of judgment which belongs to the power to fix rates", to refuse to hold the rates unreasonable in the past, as it had done in a number of other similar cases. These findings are adequate for they clearly indicate the basis for the Commission's conclusion that the rates were not unreasonable for the past.

Moreover, the findings afford a rational basis for the Commission's ultimate conclusion. Plaintiffs contend, to the contrary, that the Commission's action is arbitrary because, from evidence relating to the past it found that "measured by cost alone this rate is much too high" and concluded that for the future the rate would be unreasonable. This conclusion is said to be inconsistent with the contrary conclusion that despite the same past costs the rate was not unreasonable for the past. This contention fails to take account of the fact that the Commission in determining the reasonableness of a rate for the past and in awarding reparation performs a different function from that of determining the reasonableness of a rate for the future and prescribing a rate for the future. In fact, while the power to grant reparation was given to the Commission in the original Interstate Commerce Act of 1887, the Supreme Court held that such Act did not confer the power to prescribe reasonable rates for the future, and it was not until the Hepburn Act of June 29, 1906 (34 Stat. 584) that the Commission was given that power in the present Section 15 (49 U. S. C. 15). *Cincinnati, New Orleans & Texas Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Brady* v. *Interstate Commerce Commission*, 43 F. 2d 847, 850–851 (N. D. W. Va.), affirmed *per curiam*, 283 U. S. 804. This Court has recognized that reparation need not be ordered for the past even though a new rate is established for the future. *Baer Bros. Co.* v. *Denver & R. G. R. R.*, 233 U. S. 479, 488.

In view of the quasi-judicial nature of the Commission's function in considering the past reasonableness of the rates, it could, just as a court would normally do, properly consider its past decisions involving the same or a closely related situation as precedents. It was also entitled to attach much weight to the fact that the rates here involved compared favorably with the rates found reasonable by it in many past decisions for application to points north, south, and west of this destination area. *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U. S. 370, 389. It is well settled that there is a "zone of reasonableness," and that the Commission has much discretion in determining whether a particular rate is reasonable. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506. Under the circumstances here, its determination that this rate was not unreasonable for the past was well within the legitimate bounds of that discretion.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

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